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IN THE

SUPREME COURT

OF THE

United States

October Term, 1956

In the Matter of the Estate of LOUISE SCHNEIDER, Deceased.

HERBERT BROWNELL, JR., Attorney General of the United States as Successor to the Alien Property Custodian,

Appellant,

vs.

ANNA VALENTINE SEIBERT, and Other German Beneficiaries,

Petitioners and Respondents.

STATEMENT OF JURISDICTION

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In the Matter of the Estate of LOUISE SCHNEIDER, Deceased.

HERBERT BROWNELL, JR., Attorney General of the United States as Successor to the Alien Property Custodian,
Appellant,

vs.

ANNA VALENTINE SEIBERT, and Other German Beneficiaries,
Petitioners and Respondents.

No. .....

STATEMENT OF JURISDICTION

To the Honorable Chief Justice Earl Warren, and to the Honorable Associate Justices of the Supreme Court of the United States:

This is an appeal from the District Court of Appeal of the State of California, Second Appellate District, Division Two, which reversed a judgment of the Superior Court of the State of California in and for the County of Los Angeles holding that certain properties

were not properly the properties of the Alien Property Custodian of the United States and should not have been seized by him, and awarding these properties, which were in trust, to the Alien Property Custodian rather than to the Trustee in the United States and to the beneficiaries residing in Germany.

A.

OPINION BELOW

The Order of the District Court of Appeal, Second Appellate District was entered April 12th, 1956 (140 Adv. Cal. App. No. 4, page 771), and a Petition for Hearing in the Supreme Court of the State of California was denied June 6, 1956 (46 Advance California No. 22, page 2 following page 662). (See Appendix L.)

Notice of Appeal was duly filed within the time allowed by law, on August 7, 1956, with the Clerk of the District Court of Appeal of the State of California, Second Appellate District, Division Two.

The Record on Appeal is duly filed with the Clerk of the Supreme Court within 60 days thereafter.

Trial Judge's order (Appendix K) on petition re distribution.

B.

JURISDICTION

I.

It involves the construction of the Treaty between the United States and Germany; and the scope of the Alien Property Custodian's authority in confiscating an American's property.

The constitutionality and interpretation of Section 259 of the Probate Code of California in the light of treaty provisions between the United States and Germany and the due process and equal protection clauses of the Constitution of the United States (Fifth and Fourteenth Amendments are involved).

The construction and interpretation of certain statutes of the United States, to-wit, Trading with the Enemy Act, 50 USCA App. §5(b) and §7(c) and Executive Orders No. 9095, page 43, 50 USCA App. following §6, and General License No. 101, Vesting Order 6253 made May 29th, 1946, and the Fifth and Fourteenth Amendments to the Constitution of the United States are involved.

II.

The decision of the District Court of Appeal of the State of California, Second Appellate District was rendered April 12, 1956. Petition for hearing in the Supreme Court was denied and made final on June 6th, 1956.

Notice of appeal was duly filed August 7, 1956, or within 90 days of the decision of the District Court of Appeal of the State of California.

The certified appellate record was docketed within 60 days thereafter.

III.

Jurisdiction is conferred in this case by reason of Title 28, Section 1257(2).

QUESTIONS INVOLVED

This case is a proceeding in probate in the Superior Court of the State of California wherein it was held that $26,000 left by Emma Schneider in trust within American territories, until or unless it could go to relatives in Germany, and not yet distributed, did not vest in the Alien Property Custodian by reason of his vesting order made after the actual termination of hostilities. The District Court of Appeal reversed. The Supreme Court of California denied a hearing.

IV.

CASES BELIEVED TO SUSTAIN JURISDICTION

Hauenstein v. Lynham, 100 U.S. 483, 25 L. Ed. 628;

Ware v. Hylton, 3 Dal 199, 236, 1 L. Ed. 568;

Cherac v. Cherac, 2 Wheat 259;

Carneal v. Bank, 10 Wheat 181;

Hughes v. Edwards, 9 Wheat 489;

Clark v. Allen, 331 U.S. 503, 517, 91 L. Ed. 1633;

Hines v. Davidowitz, 312 U.S. 52, 85 L. Ed. 581;

Terrace v. Thompson, 263 U.S. 197, 60 L. Ed. 255;

Petersen v. Iowa, 245 U.S. 170; 62 L. Ed. 225;
Blythe v. Hinckley, 127 Cal. 431.;
American Banana Company v. United Fruit Company, 213 U.S. 347;
Lisenba v. California, 314 U.S. 166;
In Re Yamashita, 327 U.S. 1, 72;
Rosborough v. Rossail, 150 Fed. 2d 809, 812;
Fifth Amendment to the Constitution of the United States;
Brownell v. Edmunds, 110 Fed. Supp. 828;
Matheson v. Hicks, 10 Fed. 2d 872, 873.

V.

TREATIES, CONSTITUTIONAL PROVISIONS, EXECUTIVE ORDERS AND STATUTES INVOLVED

(1) Treaty Series No. 725, Treaty Between the United States and Germany--Article IV. (See Appendix A).

(2) Section 259 Probate Code as it existed in 1941 (See Appendix B).

(3) Section 259 Probate Code as amended (See Appendix C).

(4) 50 U.S.C.A. Appendix, Section 5(b) (See Appendix D).

(5) 50 U.S.C.A. Appendix, Section 7(c) (See Appendix E).

(6) Executive Order No. 9095, page 42, 50 U.S.C.A. App. following 6. (See Appendix F).

(7) General License No. 101, issued June 24, 1953 (See Appendix G).

(8) Vesting Order 6253, Filed May 29, 1946 (See Appendix H).

(9) Amendment to Vesting Order 6253 (See Appendix I).

(10) Fifth Amendment to the Constitution of the United States (See Appendix J).

C.

QUESTIONS PRESENTED BY APPEAL

The following questions are presented by this appeal:

I.

Whether the Alien Property Custodian of the United States had a right to seize property of an American citizen who had died in California leaving $26,000.00 in trust in an American citizen, or in a bank if he was unable to act, for the purpose of distributing the corpus of the trust to alien residents of Germany if at any time during the continuance of the trust they should be legally entitled to take and inherit under her will and the trust.

II.

Whether the Vesting Order Number 6253, made May 29th, 1946 (Clks. Tr. 65) was void in view of Title 50 U.S.C.A. App. Sec. 5(b)(1), providing that the statutory power of seizure was limited to a period "during the time of war or during any other period of

national emergency declared by the President" and whether, as construed in this case, the "time of war" was terminated with the surrender of Germany, unconditionally at 2:41 A.M., French Time, May 7, 1945, surrender formally ratified May 8th, 1945 and German Territory thereafter became an Occupation Zone of the American Government, in which these beneficiaries were residing.

III.

Whether the trust created by an American citizen, of $26,000.00, came into being and continued as and until the German heirs became legally entitled under the laws of the United States and the State of California to take and inherit under the will of the American citizen, and whether the Alien Property Custodian had jurisdiction to make a vesting order regarding the trust money.

IV.

Whether the taking of the property by the Alien Property Custodian constituted a taking of private property without due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, and constituted confiscation of property of an American citizen.

V.

Whether Section 259 of the Probate Code of the State of California as it existed after its passage in 1941 (Stats. 1941, ch. 895, §1; California Statutes, Effective July 1, 1941), inherently and as construed and

applied in this case, is in conformity with the Treaty between the United States and Germany.

VI.

Whether Section 259 of the California Probate Code has been constitutionally construed and applied under the Fifth and Fourteenth Amendments of the United States Constitution.

VII.

Whether seizure, made after the surrender of the warring nation is a valid exercise of war power.

VIII.

Whether jurisdiction existed in the Alien Property Custodian pursuant to the Trading with Enemy Act, 50 U.S.C.A. App. §5(b) and §7(c). Executive Order No. 9095, at page 43 of 50 U.S.C.A. App. following §6, authorized and gave jurisdiction on May 7, 1946 to take, hold, use, administer, liquidate, sell or otherwise deal with the interest and for the benefit of the United States the $26,000.00 of property of an American citizen left in trust by the provisions of decedent's will to another American, or to an American Bank, subject to conditions that it may be taken and inherited by the alien residents of Germany when they shall be legally entitled under the laws of the United States and of the State of California to "take and inherit" under the will and under the trust.

IX.

Whether General License No. 101, issued June 24th, 1953, which unblocked frozen assets, resulted in the release of these assets where distribution of the estate would in any event not take place until the determination of the issues in the Probate Court and on appeal; the hearing in the Probate Court having taken place on April 19, 1954 and the appeal not having been finally determined until April 12th, 1956, hearing Denied June 6th, 1956 in the state courts, and appeal is pending now in this court.

X.

Whether the Vesting Order No. 6253 made May 29th, 1946, (Clks. Tr. 65) had the effect of vesting a possible expectancy only in an estate and trust which was subject to conditions precedent in that the alien residents of Germany shall become legally entitled under the laws of the United States and the State of California to take and inherit under the Will and Trust and be able to give personal receipts.

XI.

Whether the Vesting Order No. 6253, made May 29th, 1946, (Clks. Tr. 65), had the effect to vest the interests of German Nationals when the intent of the testatrix, manifested in the Will and Trust was not to create any right by the provisions of the Will and Trust that would not avail to the personal benefit of the beneficiaries.

XII.

Whether the Vesting Order No. 6253, made May 29th, 1946, (Clks. Tr. 65), vesting "right, title and interest" of German nationals continued in force after legal termination of the war at which time the interest of the German beneficiaries actually came into effect.

XIII.

Whether the Vesting Order No. 6253, made May 29th, 1946, (Clks. Tr. 65), could vest interests of German nationals not in existence at the time of the issuance of said Vesting Order.

D.

BRIEF STATEMENT OF THE FACTS

The decedent, Louise Schneider, was an American citizen and a resident of California. On March 29, 1943, and while the United States was at war with Germany, she made her last will in the State of California and under its laws, whereby she bequeathed certain legacies to relatives of her deceased husband and herself who were nationals of Germany and resided in Germany. She provided in the will that a trust be set up with her attorney Donald R. Peck of Glendale, California in the sum of $26,000.00, for the benefit of certain heirs residing in Germany, and providing: If the heirs residing in Germany should be able to take and inherit under the laws of the United States and the State of California at any time, then the trust ceases and the money should be distributed to those

heirs in proportion as hereafter set out in paragraph of the will. The "ELEVENTH" paragraph of the will read as follows:

> "*ELEVENTH:* I give, devise and bequeath the sum of Twenty Six Thousand ($26,000.00) Dollars unto DONALD R. PECK, of Glendale, California, IN TRUST, or in the event of his death or refusal or inability to act, unto the SECURITY FIRST NATIONAL BANK OF LOS ANGELES, a national banking corporation, IN TRUST, for the following uses and purposes, to-wit:
>
> (A) Subject to the payment of the expenses of management of the trust estate and administering this trust, including a reasonable compensation for services rendered by the trustee to be determined by the court in which my estate is administered, corpus and income of and from the trust estate shall be held and distributed in the manner following:
>
> 1. The entire net income from said trust estate shall be distributed in quarterly or other convenient installments to my husband's sister, EMMA SCHNEIDER. Should EMMA SCHNEIDER die during the continuance of this trust, the income thereof shall be distributed in equal shares to my nieces, ELISE KILIAN, MARTHA MICHELS, LOUISE HILLEBOLD and MARIE HOFMAN, and to the survivor of them.
>
> 2. This trust shall terminate upon the death of the last survivor of EMMA SCHNEIDER, ELISE KILIAN, MARTHA MICHELS, LOUISE HILLEBOLD and MARIE HOFMAN and the entire corpus thereof shall be distributed as follows:

a. One-half thereof shall be distributed in equal shares to my brothers and sisters living at the time of my demise and to the then living lineal descendants of any deceased brothers and sisters of mine, said lineal descendants to take by right of representation and not per capita.

b. The other half shall be distributed in equal shares to the brothers and sisters of my deceased husband, OTTO SCHNEIDER, living at the time of my demise and to the then living lineal descendants of any deceased brothers and sisters of my deceased husband, said lineal descendants to take by right of representation and not per capita.

3. If at any time during the continuance of this trust alien residents of Germany shall become legally entitled under the laws of the United States and the State of California to take and inherit under my will and this trust, then upon the happening of that event this trust shall cease and terminate, anything to the contrary in this paragraph Eleventh of my will notwithstanding, and there shall thereupon be distributed by my trustee to the following named persons the amount of cash set opposite their respective names, to-wit:

(a) To my sister,
LISCHEN VIERECK $10,000.00

(b) To my husband's sister,
ANNA SEIBERT 5,000.00

(c) To my niece,
LOUISA HEITMANN 3,000.00

(d) To my grandnephew,
OTTO VIERECK 2,000.00

(e) To my grandniece,
KATCHEN VIERECK 1,000.00

(f) To my niece,
MARIE KRAUSE 1,000.00

(g) To my niece,
RUTH KRAUSE 1,000.00

(h) To my husband's grandnephew,
OTTO SCHNEIDER 1,000.00

(i) To my husband's nephew,
RICHARD SCHNEIDER 1,000.00

(j) To my grandniece,
LOUISE SONNENSCHEIN 1,000.00

If the total corpus of this trust on hand at the time of distribution under this subdivision be insufficient to pay the aforesaid bequests in full said bequests shall abate ratably.

"*TWELFTH:* No beneficiary under any trusts created by this will shall assign, transfer, convey, anticipate, pledge, hypothecate, or otherwise encumber his or her interest thereunder, and neither the principal of the trusts, nor any income arising therefrom, shall be liable for any bankruptcy proceeding, or claim of creditors, or be subject to any judgment rendered against any such beneficiary, or to the process of any court in aid of execution of any judgment so rendered; and all of the income and principal under the trusts shall be transferable, payable and deliverable only to the beneficiaries designated hereunder at the times entitled to take the same under the terms of the trusts, and the personal receipt of said beneficiaries shall, at the option of the trustee, be conditions precedent to the payment or delivery of the same by the trustee to such beneficiaries."

The language of Eleventh division of the will clearly and definitely creates a trust whose corpus is $26,000; makes provision for the payment of its net income to specified "income beneficiaries" and upon the death of the last survivor of such income beneficiaries, the trust shall terminate and the corpus be distributed to the beneficiaries of the trust named in A-2 and A-2-b of the Eleventh.

Sub-paragraph 3 of the Eleventh is outstanding in two respects, namely (1) it prescribes the condition that must arise to "terminate" the trust, and (2) it specifies the amount payable to each beneficiary by the trustee.

Pursuant to the petition of the executrix for instructions re distribution of the estate, after hearing the Superior Court made its findings which appear on the footnote hereof.[1] Whereupon the following order was made:

---

[1]THE FINDINGS

The Court finds that at the time of death of the decedent reciprocal rights with respect to inheritance existed between citizens of the United States of America and citizens of Germany within the purview of Section 259 of the Probate Code of California.

The Court finds that Otto Viereck is a German national and that by virtue of vesting orders heretofore filed the Attorney General of the United States is entitled to receive the specific bequest to Otto Viereck provided in paragraph Fourth of decedent's will.

The Court finds that Richard Schneider, a beneficiary under paragraph Eleventh (a), 3, (i) of decedent's will, predeceased the testatrix; that said beneficiary was not related to the decedent; that the bequest of $1,000.00 under said paragraph to said beneficiary has lapsed and falls into the residue of said estate to be distributed under the residuary provisions contained in paragraph Thirteenth of decedent's will.

The Court finds that the testatrix intended the interests created under paragraph Eleventh (a), 3 of her will to be conditional; that the intended condition precedent to the existence of the right to inherit was the co-existence of a right in the beneficiary personally to have and receive his share; that the testatrix did not intend to create any right by said provisions that would not avail to the personal benefit of the beneficiary; that the Attorney General of the United States is not entitled to any part of the twenty-six thousand dollar fund set forth

"(c) The bequest of $10,000.00 to Lischen Vierick under Paragraph Eleventh (a), 3, (a) of said Will shall be distributed in equal shares to Wilhelm Viereck and Louisa Heitman.

"(d) The cash bequests to the persons, other than Richard Schneider and Lischen Viereck, specified in paragraph Eleventh (a), 3, of said will shall be distributed to the persons and in the amounts specified therein."

The order attempting to vest the property, made by the Attorney General as Alien Property Custodian of the United States, was made after the shooting war had ended and Germany became a territory of occupation by the American troops. An amendment to the vesting order was made on May 13th, 1954. Such amendment was after the Presidential Proclamation of October 24, 1951, declaring the state of war with Germany to have terminated on October 19, 1951.

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in paragraph Eleventh of the decedent's will, except to the extent that said Attorney General participates in the bequest therein of $1,000.00 to Richard Schneider which has lapsed and falls into the residue of said estate.

The Court finds that Lischen Viereck, a beneficiary under paragraph Eleventh (A), 3, (a) of decedent's will, predeceased the testatrix; that said beneficiary was a sister of the testatrix and left surviving her two children, Wilhelm Viereck and Louisa Heitman; that said persons are entitled to receive, in equal shares, the bequest of $10,000.00 provided for Lischen Viereck in said paragraph.

The Court finds that, other than as heretofore specified, all of the beneficiaries set forth in paragraph eleven, subdivision (a), 3, of decedent's will are residents and nationals of Germany and are entitled personally to receive the respective sums specified in said paragraph.

The Court finds that by virtue of vesting orders heretofore filed the Attorney General of the United States is entitled to receive the shares of all of the German nationals who participate in the residue of the estate under the provisions of paragraph thirteen of the decedent's will.

The Court further finds that the beneficiaries to whom distribution is hereinafter ordered are German nationals.

E.

GROUNDS FOR APPEAL

The District Court of Appeal, the highest court in California which passed upon the matter said, in its opinion:

> "That the government's insistence upon its share of Mrs. Schneider's estate is confiscation was conceded at the time of the oral argument."

But such confiscation is not permitted by the Fifth or Fourteenth Amendments to the Constitution of the United States, and any statute or legislation which permits such confiscation, or any construction by the court of such statute or legislation, is itself in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

Clark v. Allen, 331 U.S. 516;
Terrace v. Thompson, 263 U.S. 197, 216.

Beginning with the Jay Treaty in 1794, which established the formula for most of our succeeding treaties, confiscation of private property of enemy aliens is prohibited. Article I of that Treaty provided: "Neither the debts due from individuals of one nation to the individuals of the other, nor shares, nor monies, which they may have in the public funds, or in the private or public banks, shall ever in any event of war or national differences be sequestered or confiscated."

Our treaty of friendship, commerce and counsellor rights of 1923, negotiated by Secretary Hughes with Germany, reaffirmed the provisions of the Jay Treaty. That treaty provided that the property of nationals

of each contracting party "shall not be taken without due process of law and without payment of just compensation." (Treaties, Conventions, International Acts, Protocols and Agreements, between the United States of America and other Powers, 1923-37 S. DOC. No. 134, 75th Congress, Third Session).

The Bonn Agreement of June 3d, 1953 reinstated the 1923 Treaty with Germany and was ratified by the United States Senate on July 27th, 1955. The important question then arises as to whether the Alien Property Custodian had jurisdiction on May 7th, 1946, a date after the close of the actual hostilities, and at a time when the United States troops were occupying Germany, to make a vesting order.

By its terms, the Statutory Power of seizure was limited to a period "during the time of war or during any other period of national emergency declared by the President." (50 U.S.C.A. App. §5(b) 1).

The expression "during the time of war" was the clear intent of Congress. Otherwise the Statute is unconstitutional and violates the Treaty Provisions between the United States and Germany and the Fifth Amendment to the Constitution of the United States, in that it provides for seizure of private property as a time when there is no war.

What did Congress mean by "during the time of war"? Surely it did not mean that civilian property could be seized after the actual fighting had ended and the American Government itself was occupying the land, as an Army of Occupation. In war, all residents

of enemy countries are enemies. (*LaMaar's Executor v. Browne*, 92 U.S. 187; *In Re Territo*, 156 Fed. 2d 142; *Ex Parte Quirin*, 317 U.S. 1). But, when the fighting is over, for the purposes of determining the property rights of the residents of the territory occupied, "the time of war" has ended; they can neither use their money nor property to aid in the continuation of hostilities. Confiscation of their property thereafter is not to be deemed authorized by any congressional legislation, or the Fifth Amendment, or any treaty.

The right of the government to take depends upon the intent of the testatrix as manifested in the will as to the time at which the rights under the will are required by the German beneficiaries. Here the American citizen left her property in trust, upon conditions precedent in the will that the German beneficiaries must be able to personally benefit and receive their share of the inheritance. That trust necessarily came into being, and not until distribution could the property go to the German heirs, but would remain in trust until that was possible.

That would depend upon the date of distribution, which date of distribution had not yet finally been determined, and the power of the Attorney General to seize has been terminated.

The intent of the deceased, an American citizen, was that only the beneficiaries, personally could take, and not that the Alien Property Custodian take, and therefore the vesting order was a clear re-writing of her will to confiscate this property for the benefit of

the United States, in violation of the treaty and of the Fifth Amendment to the Constitution of the United States.

The District Court of Appeal of the State of California recognized this fact in its opinion, when it stated: "That the government's insistence upon its share of Mrs. Schneider's estate is confiscation was conceded at the time of oral argument."

That such confiscation is not authorized by our laws; nor by the Treaty, which is the supreme law of the land and the construction, therefore, of the Vesting Order is contrary to the treaty and to the Fifth Amendment to the Constitution of the United States.

The Will itself provides a condition precedent in the intent of the testatrix that the property should be retained in the hands of an American trustee until such time as inheritance was actually possible, and it was possible for these people to receive that property.

It was perfectly lawful and proper for the testatrix to provide $26,000.00 in an American trust fund, which expressed her clear intent that she wanted this money to remain in the United States and in trust, unless or until it could be received by the German heirs personally, and not by the Alien Property Custodian. The clear intent of the will was to exclude the Alien Property Custodian, and this is testified to by the attorney who drew the will (R. Tr. 47 of the Record of Proceedings of April 19th, 1954).

The purpose of the Vesting Order of aliens is twofold: First, to prevent its use during the war, and,

second, to prevent its being received during the war. (See *McGrath v. Ward,* 91 Fed. Supp. 636; *Clark v. Edmunds,* 73 Fed. Supp. 390; *Brownell v. Edmunds,* 110 Fed. Supp. 828; *Clark v. Edmunds,* 73 Fed. Supp. 394, and *Ladue & Company v. Brownell,* 220 Fed. 2d 468, and *Brownell v. Edmunds,* 209 Fed. 2d 349).

The right to seize and vest the property in the United States depended upon the date of distribution and not the date of death of the decedent.

In probate proceedings in California, although property "vests" at the date of death of the decedent, all the property must come into the possession of the Executor or Administrator for the purposes of administration and distribution. The Executor or Administrator of an estate takes the property for the purposes of administration, and not until there is final distribution and final settlement of accounts, when all the debts and taxes are paid and the estate is in a condition to be closed, do the heirs or trustee, or other persons entitled to take possession of the property in a position to take it, get possession or "take" it. (See Probate Code of California 1020, 1024, 956; *Dabney v. Dabney,* 54 Cal. App. 2d 695, 699). It is not until the Final Decree of Distribution is made that the right of the distributee to his share accrues, and he may demand it or sue for it. (Probate Code 1021).

The vesting order therefore of the Attorney General could not take place until distribution and not at the date of death, and if his authority ended, as it did in this case, (since there has been no distribution even to date), his power of seizure has ended.

In *Defense Supplies Corporation v. Lawrence Warehouse*, 336 U.S. 631, 93 L. ed. 931, it was held that the termination of a statute terminated the power under it.

A vesting order was made at a time when the German heirs could not possibly take, and they could under no circumstance receive until final distribution. Their right to inherit, then, depended, under the language of the will under their power to take personally, and that power has not yet even come into being. See: *Harvard Trust Co. v. Attorney General*, 329 Mass. 79, (1952).

When Joint Resolution of Congress, October 19th, 1951, terminated the war officially the Joint Resolution of Congress, by its terms, only reserved the right to seize property which was "prior to January 1st, 1947 . . . subject to vesting or seizure under the provisions of the Trading with the Enemy Act." (65 Stats. 451).

But, until there is distribution of an estate there was no property subject to vesting or seizure, since it was all being held by the Executor for purposes of administration. Until the final decree of distribution, there was nothing for vesting or seizure.

This was the holding in *Brownell v. Edmunds*, 110 Fed. Supp. 828, where the interest of German nationals under a last will and testament could not be received until after the termination of the war.

At the time of the Vest Order of the Attorney General, the estate had not come into being for the German

heirs. The conditions precedent had not been fulfilled. The estate had not been probated and distribution ordered. The intent of the testatrix was frustrated by the Vesting Order of the Attorney General.

In California, as elsewhere, in the construction of the will, the paramount rule to which all others must yield is that a will is to be construed according to the intention of the testator, as expressed therein, and this intention must be given effect as far as possible. (*In re Laurence Estate,* 117 Cal. 2d 1.) Here the intent was clearly expressed and it was intended that the property should vest in the American trustee and then in the German heirs only when and if possible. These were conditions precedent of the donor which were frustrated by the Attorney General's Vesting Order. Such proceedings violated the Due Process and Equal Protection clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States. It not only deprived these heirs of their property but placed them in a different and unequal category and denied them the equal protection of the law. (See *Terrace v. Thompson,* 216 U. S. 197, 68 L. Ed. 255.)

In the majority of jurisdictions the presumption is that the words of survivorship refer to the period of distribution, *and not to the death of the testator.* (*Simes and Smith on Future Interest,* page 14, section 275.)

When property in California is not given until a future time, it is contingent and does not vest until that time occurs. (*In re Estate of Blake,* 157 Cal. 448.)

In the Opinion of the District Court of Appeal, the court made this significant comment:

> "We have derived the foregoing decision with fearful misgivings. Research has exposed a strange and regrettable anomaly in the foreign relations of our central government. For 35 years the United States has expended billions of dollars in attempting to recapture and retain the friendship and loyal adherence of our enemies opposed in two world wars. It has verily poured out its wealth to accomplish that purpose within the German Republic. Now, after more than 10 years since fighting ceased and over four years since World War II was declared terminated (50 U. S. C.A. App. p. XX) that same government, actuated by generous impulses toward a fallen foe, in nurturing the German state and its subdued people, withholds from these individuals within Germany comparatively modest sums ranging from $1,000 to $8,000, aggregating $25,000. By confiscating such moneys, we forfeit more goodwill than might have been acquired by the payment of multiplied thousands to the Bonn Government whether applied directly or indirectly to that end.
>
> That the government's insistence upon its share of Mrs. Schneider's estate is confiscation was conceded at the time of the oral argument."

We respectfully submit that the District Court of Appeal below was in error and that the trial court gave the correct interpretation to the law and a correct construction of our treaties.

The questions raised herein were raised in the trial court, and again in the District Court of Appeal of the State of California, Second Appellate District, and again in the Supreme Court of the State of California. They are substantive and require plenary consideration. Other estate cases await the decision of this court's interpretation of the questions herein.

We respectfully pray for reversal of the opinion of the District Court of Appeal and for affirmation of the opinion of the Superior Court of the State of California.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioners and Respondents.

APPENDIX

A.

Treaty Series, No. 725, as follows:

"Treaty Series, No. 725

TREATY

between

The United States and Germany

FRIENDSHIP, COMMERCE AND CONSULAR RIGHTS

Signed at Washington, December 8, 1923

Ratified advised by the Senate with Reservations and understandings, February 10, 1925

Ratified by the President, October 6, 1925

Ratifications exchanged at Washington, October 14, 1925

Proclaimed, October 14, 1925 (44 Stat. 2132)

ARTICLE IV.

Where, on the death of any person holding real or other immovable property or interests therein with the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party,

whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to see the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which be imposed in like cases upon the nationals of the country from which such proceeds may be drawn."

B.

Section 259 of the Probate Code of California as it existed in 1941, as follows:

> "§259. Inheritance by nonresident aliens limited. The right of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of reciprocal right upon the part of the citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries."

C.

Section 259 of the Probate Code of California as amended, as follows:

Section 259 of the Probate Code, as amended in 1945, as follows:

"259. The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the rights of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of all a portion of such property to an alien heir, devisee or legatee not residing within the United States or its territories a petition is filed by any person interested in the estate requesting the court to find that either one

or both of such reciprocal rights does not or do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the non-existence of such reciprocal right or rights shall be upon the petitioner. Notice of such hearing shall be given in the manner provided by section 1200 of this code."

Section 259 of the Probate Code, as later amended in 1947 now reads:

"§259. *Rights of Non-Resident Aliens to Inherit Reciprocal.*—The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. Leg. H. 1941 ch. 895. Enacted as an urgency measure: effective June 28, 1941, 1945 ch. 1160, 1947 ch. 1042.

NOTE: "§259. 1947 Delete. 1. It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of all or a portion of such property to the alien heir, devisee or legatee not residing within the United States or its territories a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not or do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the nonexistence of such reciprocal right or rights shall be upon the petitioner. Notice of such hearing shall be given in the manner provided by Section 1200 of this code.

§259. 1945 Deletes. 1. either real or personal property or the proceeds thereof. 2. and personal property and the proceeds thereof. 3. inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries.

"§259.1. Burden of Proof Upon Alien. Leg. H. 1941 ch. 895. Declared an urgency measure; effective immediately. Approved by Governor June 28, 1941; repealed 1945 ch. 1160. A new §259.1 follows:

"259.1. *Burden Upon Non-resident Aliens to Establish Reciprocal Rights.* The burden shall be upon such nonresident aliens to establish the fact

of existence of the reciprocal rights set forth in Section 259. Leg. H. 1947 ch. 1042.

"259.2. Property Escheats If No Eligible Heirs.—Leg. Hr. 1941 ch. 895. Declared an urgency measure; effective immediately. Approved by Governor June 28, 1941; repealed 1945 ch. 1160. A new §259.2 follows:

"§259.2. Property To Be Disposed of as Escheated Property — When. If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property. Leg. H. 1947 ch. 1042.

D.

50 U.S.C.A., Appendix, Section 5(b), as follows:

Title 50, App. §5(b), U. S. C. A. — Trading with Enemy Act, as follows:

"§5. *Suspension of provisions relating to ally of enemy; regulation of transaction in foreign exchange of gold or silver.*

(a) . . . .

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing,

exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which

any foreign country or any national thereof has or has had any interest or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, required the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision."

E.

50 U.S.C.A.—Appendix, Section 7(c), as follows:

Title 50, App. §7(c) U. S. C. A. — Trading with Enemy Act, as follows:

"(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade-marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian;

and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act [sections 1-6 and 7-39 of this Appendix].

Any requirement made pursuant to this Act [said sections], or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded.

Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificiates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien

Property Custodian, or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act [same sections], and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States."

F.

Executive Order No. 9095—page 42, 50 U.S.C.A.—Appendix following 6, as follows:

Executive Order No. 9095, as follows:

"EXECUTIVE ORDER NO. 9095

March 11, 1942, 7 F. R. 1971, as amended Ex. Ord. No. 9193, July 6, 1942, 7 F. R. 5205, Ex. Ord. No. 9567, June 8, 1945, 10 F. R. 6917.

WORLD WAR II ALIEN PROPERTY CUSTODIAN

1. There is hereby established in the Office for Emergency Management of the Executive Office of the President the Office of Alien Property Cus-

todian, at the head of which shall be an Alien Property Custodian appointed by the President. The Alien Property Custodian shall receive compensation at such rate as the President shall approve and in addition shall be entitled to actual and necessary transportation, subsistence, and other expenses incidental to the performance of his duties. Within the limitation of such funds as may be made available for that purpose, the Alien Property Custodian may appoint assistants and other personnel and delegate to them such functions as he may deem necessary to carry out the provisions of this Executive Order.

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

(a) Any business enterprise within the United States which is a national of a designated enemy country and any property of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is evidence of ownership or control of any such business enterprise, and any interest of any nature whatsoever in such business enterprise held by an enemy country or national thereof;

(b) any other business enterprise within the United States which is a national of a foreign country and any property of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is evidence of ownership or control of any such business enterprise, and any interest of

any nature whatsoever in such business enterprise held by a foreign country or national thereof, when it is determined by the Custodian and he has certified to the Secretary of the Treasury that it is necessary in the national interest, with respect to such business enterprise, either (i) to provide for the protection of the property, (ii) to change personnel or supervise the employment policies, (iii) to liquidate, reorganize, or sell, (iv) to direct the management in respect to operations, or (v) to vest;

(c) any other property or interest within the United States of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, a designated enemy country or national thereof; Provided, however, That with respect to any such country or national other than Germany or Japan or any national thereof, such property or interest shall not include cash, bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange, and securities except to the extent that the Alien Property Custodian determines that such cash, bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange, and securities are necessary for the maintenance or safeguarding of other property belonging to the same designated enemy country or the same national thereof and subject to vesting pursuant to section 2 hereof;

(d) any patent, patent application, design patent, design patent application, copyright, copyright application, trade-mark or trademark appli-

cation or right related thereto in which any foreign country or national thereof has any interest and any property of any nature whatsoever (including, without limitation, royalties and license fees) payable or held with respect thereto, and any interest of any nature whatsoever held therein by any foreign country or national thereof;

(e) any ship or vessel or interest therein, in which any foreign country or national thereof has an interest; and

(f) any property of any nature whatsoever which is in the process of administration by any person acting under judicial supervision or which is in partion, libel, condemnation or other similar proceedings and which is payable or deliverable to, or claimed by, a designated enemy country or national thereof. When the Alien Property Custodian determines to exercise any power and authority conferred upon him by this section with respect to any of the foregoing property over which the Secretary of the Treasury is exercising any control and so notifies the Secretary of the Treasury in writing, the Secretary of the Treasury shall release all control of such property, except as authorized or directed by the Alien Property Custodian.

3. Subject to the provisions of this Executive Order, all powers and authority conferred upon me by section 3(a) and 5(b) of the Trading with the Enemy Act, as amended [sections 3(a) and 5(b) of this Appendix] are hereby delegated to the Secretary of the Treasury or any person, agency, or instrumentality designated by him; provided, however, that when any property or inter-

est, not belonging to a foreign government or central bank, shall be vested by the Secretary of the Treasury, such property or interest shall be vested in, and dealt with by, the Alien Property Custodian upon the terms directed by the Secretary of the Treasury. Except as otherwise provided herein, this Executive Order shall not be deemed to modify or amend Executive Order No. 8389, as amended [note to section 95a of Title 12], or the President's Proclamation of July 17, 1941, or Executive Order No. 8839, as amended, or the regulations, rulings, licenses and other action taken thereunder, or in connection therewith.

4. Without limitation as to any other powers or authority of the Secretary of the Treasury or the Alien Property Custodian under any other provision of this Executive Order, the Secretary of the Treasury and the Alien Property Custodian are authorized and empowered, either jointly or severally, to prescribe from time to time, regulations, rulings, and instructions to carry out the purposes of this Executive Order. The Secretary of the Treasury and the Alien Property Custodian each shall make available to the other all information in his files to enable the other to discharge his functions, and shall keep each other currently informed as to investigations being conducted with respect to enemy ownership or control of business enterprises within the United States.

5. The Alien Property Custodian is authorized to issue appropriate regulations governing the service of process or notice upon any person within any designated enemy country or any enemy occupied territory in connection with any court

or administrative action or proceeding within the United States. The Alien Property Custodian also is authorized to take such other and further measures in connection with representing any such person in any such action or proceeding as in his judgment and discretion is or may be in the interest of the United States. If, as a result of any such action or proceeding, any such person obtains, or is determined to have, an interest in any property (including money judgments), such property, less an amount equal to the costs and expenses incurred by the Alien Property Custodian in such action or proceeding, shall be subject to the provisions of Executive Order No. 8389, as amended [note to section 95a of Title 12], provided, however, that this shall not be deemed to limit the powers of the Alien Property Custodian under section 2 of this Order; and provided further, that the Alien Property Custodian may vest an amount of such property equal to the costs and expenses incurred by the Alien Property Custodian in such action or proceeding.

6. To enable the Alien Property Custodian to carry out his functions under this Executive Order, there are hereby delegated to the Alien Property Custodian or any person, agency or instrumentality designated by him all powers and authority conferred upon me by section 5(b) of the Trading with the Enemy Act, as amended [section 5(b) of this Appendix], including, but not limited to, the power to make such investigations and require such reports as he deems necessary or appropriate to determine whether any enterprise or property

should be subject to his jurisdiction and control under this Executive Order. The powers and authority conferred upon the Alien Property Custodian by Executive Order No. 9142 [note to this section] shall be administered by him in conformity with the provisions of this Executive Order.

7. In the exercise of the authority herein delegated, the Alien Property Custodian shall be subject to the provisions of Executive Order No. 8839 of July 30, 1941, and shall designate a representative of the Board of Economic Warfare in accordance with section 6 thereof.

8. All records and other property (including office equipment) of the Treasury Department which are used primarily in the administration of powers and duties to be exercised by the Alien Property Custodian, and such personnel as is used primarily in the administration of such powers and duties and which was hired by the Treasury Department after September 1, 1941 (including officers whose chief duties relate to the administration of such powers and duties), as the Secretary of the Treasury and the Alien Property Custodian shall jointly certify for transfer, shall be transferred to the Office of the Alien Property Custodian. In the event of disagreement concerning the transfer of any personnel, records, or property, the determination shall be made by the Director of the Bureau of the Budget, pursuant to the formula here prescribed. Any personnel transferred pursuant to this Executive Order shall be transferred without loss of such Civil Service status or eligibility therefor as they may have.

9. This Executive Order shall not be deemed to modify or amend Executive Order No. 8843 of August 9, 1941 [note to section 5 of this Appendix], and the regulations, rulings, licenses and other action taken thereunder. Any and all action heretofore taken by the Secretary of the Treasury or the Alien Property Custodian, or by any person, agency, or instrumentality designated by either of them, pursuant to sections 3(a) and 5(b) of the Trading with the Enemy Act, as amended [sections 3(a) and 5(b) of this Appendix] or pursuant to prior Executive Orders, and any and all action heretofore taken by the Board of Governors of the Federal Reserve System pursuant to Executive Order No. 8843 of August 9, 1941, are hereby confirmed and ratified.

10. For the purpose of this Executive Order:

(a) The terms "designated enemy country" shall mean any foreign country against which the United States has declared the existence of a state of war (Germany, Italy, Japan, Bulgaria, Hungary and Rumania) and any other country with which the United States is at war in the future. The term "national" shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended [note to section 95a of Title 12], provided, however, that persons not within designated enemy countries (even though they may be within enemy-occupied countries or areas) shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines: (i) that such person is controlled by or action for or on behalf of (including cloaks for) a designated enemy country or a person within

such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy-occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country. For the purpose of this Executive Order any determination by the Alien Property Custodian that any property or interest of any foreign country or national thereof is the property or interest of a designated enemy country or national thereof shall be final and conclusive as to the power of the Alien Property Custodian to exercise any of the power or authority conferred upon by section (b) of the Trading with the Enemy Act, as amended [section 5(b) of this Appendix].

(b) The term "business enterprise within the United States" shall mean any individual proprietorship, partnership, corporation or other organization primarily engaged in the conduct of a business within the United States, and any other individual proprietorship, partnership, corporation or other organization to the extent that it has an established office within the United States engaged in the conduct of business within the United States.

11. The Secretary of the Treasury or the Alien Property Custodian, as the case may be, shall, except as otherwise agreed to by the Secretary of State, consult with the Secretary of State before vesting any property or interest pursuant to this Executive Order, and the Secretary of the Treasury shall consult with the Secretary of State before

issuing any Order adding any additional foreign countries to section 3 of Executive Order No. 8389, as amended [note to section 95a of Title 12].

12. Any orders, regulations, rulings, instructions, licenses or other actions issued or taken by any person, agency or instrumentality referred to in this Executive Order, shall be final and conclusive as to the power of such person, agency or instrumentality to exercise any of the power or authority conferred upon me by sections 3(a) and 5(b) of the Trading with the Enemy Act, as amended [section 3(a) and 5(a) of this Appendix]; and to the extent necessary and appropriate to enable them to perform their duties and functions hereunder, the Secretary of the Treasury and the Alien Property Custodian shall be deemed to be authorized to exercise severally any and all authority, rights, privileges and powers conferred on the President by sections 3(a) and 5(b) of the Trading witih the Enemy Act of October 6, 1917, as amended, [sections 3(a) and 5(b) of this Appendix] and by sections 301 and 302 of Title III of the First War Powers Act, 1941, approved December 18, 1941 [sections 616 and 617 of this Appendix]. No person affected by any order, regulation, ruling, instruction, license or other action issued or taken by either the Secretary of the Treasury or the Alien Property Custodian shall be entitled to challenge the validity thereof or otherwise excuse his actions, or failures to act, on the ground that pursuant to the provisions of this Executive Order, such order, regulation, ruling, instruction, license or other action was within the

jurisdiction of the Alien Property Custodian rather than the Secretary of the Treasury or vice versa.

13. Any regulation, ruling, instructions, licenses, determinations or other actions issued, made or taken by any agency or person referred to in this Executive Order, purporting to be under the provisions of this Executive Order or any other proclamation, order or regulation, issued under section 3(a) or 5(b) of the Trading with the Enemy Act, as amended [sections 3(a) and 5 (a) of this Appendix] shall be conclusively presumed to have been issued, made or taken after appropriate consultation as herein required and after appropriate certification is required pursuant to the provisions of this Executive Order."

General License No. 101, issued June 24 1953, as follows:

G.

General License No. 101, issued June 24, 1953, as follows:

"TITLE 8—ALIENS AND NATIONALITY
CHAPTER II—OFFICE OF ALIEN PROPERTY, DEPARTMENT OF JUSTICE—
PART 511—BLOCKED ASSETS

§511.101 (General License No. 101)—(1) Notwithstanding §511.211a (General Ruling No. 11A) a general license is hereby granted licensing all property now blocked under the order to be regarded as property in which no blocked country or national thereof has, or has had, any interest: *Provided, however,* that the license granted by this

paragraph shall not apply to any property blocked by reason of the interest on or since the effective date of the order of any of the following:

(a) Bulgaria, Hungary, Rumania, Czechoslovakia, Poland, Estonia, Latvia, Lithuania and Germany (except for any interest of Germany now owned by the Federal Republic of Germany, the City of Berlin (Western Sectors) or the Saar);

(b) any individual, partnership, association, corporation or other organization which on January 1, 1945 was in Bulgaria, Hungary or Rumania;

(c) any individual, partnership, association, corporation or other organization which on December 7, 1945 was in Czechoslovakia, Poland, Estonia, Latvia or Lithuania;

(d) any individual, partnership, association, corporation or other organization which on December 31, 1946 was in any of the areas of Germany under control or administration of the Union of Soviet Socialist Republics or Poland; or

(e) any other partnership, association, corporation or other organization which was a national of any country designated in subparagraph (a) of this paragraph by reason of the interest therein of any such country or by reason of the interest therein of any individual, partnership, association, corporation or other organization specified in subparagraph (b), (c) or (d) of this paragraph.

(2) Nothing in this section shall be deemed to apply to any property subject to to §511.205 and §511.205b (General Ruling Nos. 5 and 5B), relating to foreign and domestic scheduled securities.

(3) Nothing in this section shall be deemed to apply (a) to any property or interest that has been vested, or as to which an outstanding supervisory order has been issued, by the Attorney General or the Alien Property Custodian or the Office of Alien Property Custodian, or (b) to any business enterprise and/or its property as to which the Attorney General or the Alien Property Custodian or the Office of Alien Property Custodian has issued an outstanding supervisory order, or which has been vested, or assets of or interests in which have been vested.

(4) Nothing in this section shall be deemed to authorize any transaction prohibited by the Foreign Assets Control regulations, 31 CFR, Chapter V, issued by the Treasury Department.

(Sec. 5, 40 Stat. 415, as amended, 50 U.S.C. App. 5; Executive Order 8389, Apr. 10, 1940, 5 F. R. 1400, as amended by Executive Order 8785, June 14, 1941, 6 F. R. 2897, Executive Order 8832, July 26, 1941, 6 F. R. 3715, Executive Order 8963, December 9, 1941, 6 F. R. 6348, Executive Order 8998, December 26, 1941, 6 F. R. 6785, and Executive Order 9193, July 6, 1942, 7 F. R. 5205, 3 CFR, 1943 Cum. Supp.; Executive Order 9989, August 20, 1948, 13 F. R. 4891, 3 CFR, 1948 Supp.; Executive Order 10348, Apr. 26, 1952, 17 F. R. 3769, 3 CFR, 1952 Supp.)

Executed at Washington, D.C. on June 24, 1953.

For the Attorney General:
Dallas S. Townsend
Assistant Attorney General
Director, Office of Alien Property

(Official Seal)"

H.

Vesting Order No. 6253, as follows: (Filed May 29, 1946)

"UNITED STATES OF AMERICA
OFFICE OF ALIEN PROPERTY
CUSTODIAN

Vesting Order Number 6253

Re: Estate of Louise Schneider, deceased
(File D-28-9663; E. T. Sec. 13449)

Under the authority of the Trading with the Enemy Act, as amended, and Executive Order No. 9095, as amended, and pursuant to law, the undersigned, after investigation, finding:

That the property described as follows:

All right, title, interest and claim of any kind or character whatsoever of Otto Viereck, Lischen Viereck, Anna Seibert, Eugene Schneider, Louisa Heitmann, Katchen Viereck, Marie Krause, Ruth Krause, Otto Schneider, Richard Schneider, Louise Sonnenschein, Martin Krause, Lilian Ring, Horst Ring, Friedrich Adolf, Heinrich Adolf, Ludwig Hillebold, Anna Hofmann, Elizabeth Hillebold, Adam Krause, Elise Boller and Anna Sonnenschein, and each of them, in and

to the Estate of Louise Schneider, deceased, is property payable or deliverable to, or claimed by, nationals of a designated enemy country, Germany, namely,

Nationals:	Last known address:
Otto Viereck	Germany
Lischen Viereck	Germany
Anna Seibert	Germany
Eugene Schneider	Germany
Louise Heitmann	Germany
Katchen Viereck	Germany
Marie Krause	Germany
Ruth Krause	Germany
Otto Schneider	Germany
Richard Schneider	Germany
Louise Sonnenschein	Germany
Martin Krause	Germany
Lilian Ring	Germany
Horst Ring	Germany
Freidrich Adolf	Germany
Heinrich Adolf	Germany
Ludwig Hillebold	Germany
Anna Hofmann	Germany
Elizabeth Hillebold	Germany
Adam Krause	Germany
Elise Beller	Germany
Anna Sonnenschein	Germany

That such propery is in the process of administration by Emma Schneider and Elise Kilian, as Executrices of the Estate of Louise Schneieder, acting under the judicial supervision of the Superior Court of the State of California, in and for the County of Los Angeles;

And determining that to the extent that such nationals are persons not within a designated enemy country, the national interest of the United States requires that such persons be treated as nationals of a designated enemy country, (Germany);

And having ma le all determinations and taken all action required by law, including appropriate consultation and certification, and deeming it necessary in the national interest,

HEREBY VESTS in the Alien Property Custodian the property described above, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest and for the benefit of the United States.

Such property and any or all of the proceeds thereof shall be held in an appropriate account or accounts, pending further determination of the Alien Property Custodian. This Order shall not be deemed to limit the power of the Alien Property Custodian to return such property or the proceeds thereof in whole or in part, nor shall it be deemed to indicate that compensation will not be paid in lieu thereof, if and when it should be determined to take any one or all of such actions.

Any person, except a national of a designated enemy country, asserting any claim arising as a result of this Order may, within one year from the date hereof, or within such further time as may be allowed, file with the Alien Property Custodian on Form APC-1 a notice of claim, together with the request for a hearing thereon. Nothing herein contained shall be deemed to constitute an admis-

sion of the existence, validity or right to allowance of any such claim.

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in Section 10 of Executive Order No. 9095, as amended.

Executed at Washington, D. C., on May 7, 1946.

(Signed) James E. Markham
James E. Markham
Alien Property Custodian."

(Official Seal)

I.

Amendment to Vesting Order 6253 dated May 7, 1946, as follows:

DEPARTMENT OF JUSTICE
OFFICE OF ALIEN PROPERTY
Amendment to Vesting Order 6253
Re: Estate of Louise Schneider, deceased
File No. D-28-9663

Vesting Order 6253 dated May 7, 1946, is hereby amended as follows and not otherwise:

1. By inserting immediately after the words "All right, title, interest and claims of any kind or character whatsoever of", the names "Wilhelm Viereck, Hedwig Schneider", and by inserting immediately under the columnar headings "Nationals:" and "Last Known Address:", the following names and addresses, respectively:

Wilhelm Viereck	Germany
Hedwig Schneider	Germany

All other provisions of said Vesting Order 6253 and all actions taken by or on behalf of the Attorney General of the United States in reliance thereon, pursuant thereto and under the authority thereof are hereby ratified and confirmed.

(40 Stat. 411, 50 U.S.C. App. 1; 55 Stat. 839, 50 U.S. C. App. Sup. 616; Pub. Law, 322, 79th Cong., 60 Stat. 50; Public 671, 79th Cong.; 60 Stat. 925; E. O. 9193, July 6, 1942, 7 F. R. 5205, 3 CFR, Cum. Supp.; E. O. 9567, June 8, 1945, 10 F. R. 6917, 3 CFR 1945, Supp. ; E. O. 9788, October 14, 1946, 11 F. R. 11981)

Executed at Washington, D. C. on May 13, 1954

For the Attorney General:
(Signed) Dallas S. Townsend
Dallas S. Townsend,
Assistant Attorney General,
Director, Office of Alien Property

(Official Seal)."

J.

Fifth Amendment to the Constitution of the United States, as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in

any criminal case to be a witness against himself, nor be deprived of life—liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

K.

Trial Judge's Order on Petition for Instructions Re Distribution, Filed March 10th, 1955, as follows:

(Clks. Tr. 32-35)

The petition of Elise Kilian, as executrix of the estate of Louise Schneider, deceased, for instructions re distribution of the above entitled estate came on regularly for hearing on the 19th day of April, 1954, in Department 5 of the above entitled Court, Honorable Roy L. Herndon, judge presiding; Donald R. Peck, Esq., appeared as attorney for the executrix of said estate, H. A. Gebhardt, Esq., appeared as attorney for Anna Valentine Seibert, and other German Beneficiaries, and Mary Eschweiler, attorney, office of Alien Property, Department of Justice, and Arline Martin, Assistant United States Attorney, appeared on behalf of the Attorney General of the United States. Proof was made to the satisfaction of the Court and the Court finds that due notice of the time and place of hearing has been given as required by law.

Evidence, both oral and documentary, having been introduced on behalf of the respective parties, and oral and written arguments having been submitted, the Court determines and renders judgment as follows:

The Court finds that at the time of death of the decedent reciprocal rights with respect to inheritance existed between citizens of the United States of America and citizens of Germany within the purview of Section 259 of the Probate Code of California.

The Court finds that Otto Viereck is a German National and that by virtue of vesting orders heretofore filed the Attorney General of the United States is entitled to receive the specific bequest to Otto Viereck provided in paragraph Fourth of decedent's will.

The Court finds that Richard Schneider, a beneficiary under paragraph Eleventh (A), 3, (i) of decedent's will, predeceased the testatrix; that said beneficiary was not related to the decedent; that the bequest of $1,000.00 under said paragraph of said beneficiary has lapsed and falls into the residue of said estate to be distributed under the residuary provisions contained in paragraph Thirteen of decedent's will.

The Court finds that the testatrix intended the interests created under paragraph Eleventh (A), 3 of her will to be conditional; that the intended condition precedent to the existence of the right to inherit was the co-existence of a right in the beneficiary personally to have and receive his share; that the testatrix did not intend to create any right by said provisions that would not avail to the personal benefit of the beneficiary; that the Attorney General of the United States is not entitled to any part of the twenty-six thousand dollar fund set forth in paragraph Eleventh of decedent's will, except to the extent that said Attorney General

participates in the bequest therein of $1,000.00 to Richard Schneider which has lapsed and fails into the residue of said estate.

The Court finds that Lischen Viereck, a beneficiary under paragraph Eleventh (A), 3, (a) of decedent's will, predeceased the testatrix; that said beneficiary was a sister of the testatrix and left surviving her two children, Wilhelm Viereck and Louisa Heitman; that said persons are entitled to receive, in equal shares, the bequest of $10,000.00 provided for Lischen Viereck in said paragraph.

The Court finds that, other than as heretofore specified, all of the beneficiaries set forth in paragraph eleven, subdivisions (A), 3, of decedent's Will are residents and Nationals of Germany and are entitled personally to receive the respective sums specified in said paragraph.

The Court finds that by virtue of vesting orders heretofore filed the Attorney General of the United States is entitled to receive the shares of all of the German Nationals who participate in the residue of the estate under the provisions of paragraph thirteenth of decedent's will.

The Court further finds that the beneficiaries to whom distribution is hereinafter ordered are German Nationals.

IT IS ORDERED, ADJUDGED AND DECREED, that upon final distribution of said estate:

(a) The specific bequest to Otto Viereck under paragraph Fourth of decedent's will shall be

distributed to the Attorney General of the United States.

(b) The bequest of $1,000.00 to Richard Schneider under paragraph Eleventh (A), 3, (i) of said Will shall be distributed in accordance with the residuary provisions contained in paragraph Thirteenth thereof.

(c) The bequest of $10,000.00 to Lischen Viereck under paragraph Eleventh (A), 3, (a) of said Will shall be distributed in equal shares to Wilhelm Viereck and Louisa Heitman.

(d) The cash bequest to the persons, other than Richard Schneider and Lischen Viereck, specified in paragraph Eleventh (A), 3, of said Will shall be distributed to the persons and in the amounts specified therein.

(e) The portions of the residue of said estate will pass to each and all of the German Nationals under paragraph Thirteenth of said Will shall be distributed to the Attorney General of the United States.

Done at Los Angeles, California, this 10th day of March, 1955.

/s/ ROY L. HERNDON
Judge of said Court

Approved as to form

/s/ H. A. GEBHARDT
Attorney for Anna Valentine Seibert

/s/ LAUGHLIN E. WATERS, U.S. ATTY.
By ARLINE MARTIN, ASST. U.S. ATTY.

Assistant United States Attorney

L.

Trial Judge's Memorandum of Ruling, Filed October 13, 1954, as follows: (Clks. Tr. 29, 30)

"After considering the briefs of counsel, the court has reached the following conclusions:

(1) That the Attorney General is entitled to receive distribution of the specific bequest made to Otto Viereck, together with the shares of the German Nationals in the residue.

(2) That the testatrix intended the interests created under the provisions of Paragraph A 3 of Article XI of her will to be conditional. The intended condition precedent to the existence of the right to inherit was the co-existence of a right in the beneficiary personally to have and receive his share. Perhaps it would be more accurate to say that the textatrix did not intend to create any right by the provisions of Paragraph A 3 that would not avail to the personal benefit of the beneficiary. Hence, the Attorney General is not entitled to any part of the twenty-six thousand dollar fund except the share of Otto Viereck, which has lapsed and falls into the residue.

(3) That the bequest of Lieschen Viereck, sister of the testatrix, passes to her surviving children by virtue of the provisions of Section 92 of the Probate Code.

Counsel for the executor will prepare and submit an order reciting the appropriate findings consistent with the views announced by the court at the conclusion of the hearing and as set forth herein.

Dated: October 13, 1954.

/s/ Roy L. Herndon
Judge

M.

OPINION

[Civ. No. 21489. Second Dist., Div. Two. Apr. 12, 1956]
Estate of LOUISE SCHNEIDER, Deceased. HERBERT BROWNELL, JR., as United States Attorney General, Appellant v. ELISE KILIAN, et al., Respondents.

APPEAL from an order of the Superior Court of Los Angeles County vesting in the Alien Property Custodian all right, title and claim of certain German nationals named beneficiaries of a testamentary trust. Roy L. Herndon, Judge. Reversed.

Dallas S. Townsend, Assistant Attorney General (United States), Director, Office of Alien Property; Laughlin E. Waters, United States Attorney; Max F. Deutz, Chief, Civil Division; Arline Martin, Assistant United States Attorney, Southern District of California; Mary Eschweiler, Office of Alien Property; James D. Hill, George B. Searls and Irwin A. Seibel, Attorneys, Department of Justice (Washington, D.C.), for Appellant.

H. A. Gebbardt for Respondents.

MOORE, P.J.—[1a] The question for decision is whether, despite the vesting order of the Alien Property Custodian vesting in him all right, title and claim of certain German nationals named beneficiaries of a testamentary trust in the will of Louise Schneider, deceased, the superior court lawfully distributed to such nationals the interests provided for or bequeathed to them by decedent.

Decedent was an American citizen and a resident of California. March 29, 1943, she made her last will —whereby she bequeathed certain legacies to relatives of her deceased husband and herself who were nationals of Germany and resided in the Fatherland. The testatrix departed this life on March 31, 1945. On May 7, 1946, pursuant to statute, the Alien Property Custodian made a vesting order[1] declaring "All right, title, interest and claim of any kind or character whatsoever of Otto Viereck" and other specified German nationals "in and to the Estate of Louise Schneider, deceased" to be vested in him, the Alien Property Custodian, "to be held, used, administered, liquidated, sold or otherwise dealt with in the interest and for the benefit of the United States."

The provisions of the will so far as pertinent to this proceeding are as follows, to wit:

"ELEVENTH: I give, devise and bequeath the sum of Twenty Six Thousand ($26,000.00) Dollars unto DONALD R. PECK, of Glendale, California, IN TRUST, or in the event of his death or refusal or inability to act, unto the SECURITY FIRST NATIONAL BANK OF LOS ANGELES, a national banking corporation, IN TRUST, for the following uses and purposes, to wit:

"(A) Subject to the payment of the expenses of management of the trust estate and administering this trust, including a reasonable compensation for services rendered by the trustee to be determined by the court

[1]Pursuant to the Trading with the Enemy Act, 50 U.S.C.A. §§5(b) and 7(c); Executive Order 9095, at p. 43 of 50 U.S.C.A. following §6.

in which my estate is administered, corpus and income of and from the trust estate shall be held and distributed in the manner following:

"1. The entire net income from said trust estate shall be distributed in quarterly or other convenient installments to my husband's sister, EMMA SCHNEIDER. Should EMMA SCHNEIDER die during the continuance of this trust, the income thereof shall be distributed in equal shares to my nieces, ELISE KILIAN, MARTHA MICHELS, LOUISE HILLEBOLD and MARIE HOFMAN, and to the survivor of them.

"2. This trust shall terminate upon the death of the last survivor of EMMA SCHNEIDER, ELISE KILIAN, MARTHA MICHELS, LOUISE HILLEBOLD and MARIE HOFMAN and the entire corpus therof shall be distributed as follows:

"a. One-half thereof shall be distributed in equal shares to my brothers and sisters living at the time of my demise and to the then living lineal descendants of any deceased brothers and sisters of mine, said lineal descendants to take by right of representation and not per capita.

"b. The other half shall be distributed in equal shares to the brothers and sisters of my deceased husband, OTTO SCHNEIDER, living at the time of my demise and to the then living lineal descendants of any deceased brothers and sisters of my deceased husband, said lineal descendants to take by right of representation and not per capita.

"3. If at any time during the continuance of this trust alien residents of Germany shall become legally entitled under the laws of the United States and the State of California to take and inherit under my will and this trust, then upon the happening of that event this trust shall cease and terminate, anything to the contrary in this paragraph Eleventh of my will notwithstanding, and there shall thereupon be distributed by my trustee to the following named persons the amount of cash set opposite their respective names, to wit:

(a) To my sister Lischen Viereck	$10,000.00
(b) To my husband's sister, Anna Seibert	5,000.00
(c) To my niece, Louisa Heitman	3,000.00
(d) To my grandnephew, Otto Viereck	2,000.00
(e) To my grandniece, Katchen Viereck	1,000.00
(f) To my niece, Marie Krause	1,000.00
(g) To my niece, Ruth Krause	1,000.00
(h) To my husband's grandnephew, Otto Schneider	1,000.00
(i) To my husband's nephew, Richard Schneider	1,000.00
(j) To my grandniece, Louise Sonnenschein	1,000.00

If the total corpus of this trust on hand at the time of distribution under this subdivision be insufficient to pay the aforesaid bequests in full said bequests shall abate ratably."

"TWELFTH: No beneficiary under any trusts created by this will shall assign, transfer, convey, anticipate, pledge, hypothecate, or otherwise encumber his or her interest thereunder, and neither the principal of the trusts, nor any income arising therefrom, shall be liable for any debt of any such beneficiary or be subject to any bankruptcy proceeding, or claim of creditors, or be subject to any judgment rendered against any such beneficiary, or to the process of any court in aid of execution of any judgment so rendered; and all of the income and principal under the trusts shall be transferable, payable and deliverable only to the beneficiaries designated hereunder at the times entitled to take the same under the terms of the trusts, and the personal receipt of said beneficiaries shall, at the option of the trustee, be conditions precedent to the payment or delivery of the same by the trustee to such beneficiaries."

The language of Eleventh division of the will clearly and definitely creates a trust whose corpus is $26,000; makes provision for the payment of its net income to specified "income beneficiaries" and upon the death of the last survivor of such income beneficiaries, the trust shall terminate and the corpus be distributed to the beneficiaries of the trust named in A-2-a and A-2-b of the Eleventh.

Subparagraph 3 of Eleventh is outstanding in two respects, namely, (1) it prescribes the condition that must arise to "terminate" the trust, and (2) it specifies the amount payable to each beneficiary by the trustee.

Pursuant to the petition of the executrix for instructions *re* distribution of the estate, after hearing, the court below made its findings which appear on the margin hereof.[2] Whereupon the following order was made:

"(c) The bequest of $10,000.00 to Lischen Viereck under paragraph Eleventh (A), 3, (a) of said Will shall be distributed in equal shares to Wilheim [sic] Viereck and Louisa Heitman.

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[2]THE FINDINGS

The court finds that at the time of death of the decedent reciprocal rights with respect to inheritance existed between citizens of the United States of America and citizens of Germany within the purview of Section 259 of the Probate Code of California.

The court finds that Otto Viereck is a German National and that by virtue of vesting orders heretofore filed the Attorney General of the United States is entitled to receive the specific bequest of Otto Viereck provided in paragarph Fourth of decedent's will.

The court finds that Richard Schneider, a beneficiary under paragraph Eleventh (A), 3, (i) of decedent's will, predeceased the testatrix; that said beneficiary was not related to the decedent; that the bequest of $1,000.00 under said paragraph to said beneficiary has lapsed and falls into the residue of said estate to be distributed under the residuary provisions contained in paragraph Thirteenth of decedent's will.

The court finds that the testatrix intended the interests created under paragraph Eleventh (A), 3 of her will to be conditional; that the intended condition precedent to the existence of the right to inherit was the coexistence of a right in the beneficiary personally to have and receive his share; that the testatrirx did not intend to create any right by said provisions that would not avail to the personal benefit of the beneficiary; that the Attorney General of the United States is not entitled to any part of the twenty-six thousand dollar fund set forth in paragraph Eleventh of decedent's will, except to the extent that said Attorney General participates in the bequest therein of $1,000.00 to Richard Schneider which has lapsed and falls into the residue of said estate.

The court finds that Lischen Viereck, a beneficiary under paragraph Eleventh (A), 3, (a) of decedent's will, predeceased the testatrix; that said beneficiary was a sister of the testatrix and left surviving her two children, Wilhelm Viereck and Louisa Heitman; that said persons are entitled to receive, in equal shares, the bequest of $10,000 provided for Lischen Viereck in said paragraph.

The court finds that, other than as heretofore specified, all of the beneficiaries set forth in paragraph eleven, subdivision (A), 3, of decedent's will are residents and Nationals of Germany and are entitled personally to receive the respective sums specified in said paragraph.

The court finds that by virture of vesting orders heretofore filed the Attorney General of the United States is entitled to receive the shares of all of the German Nationals who participate in the residue of the estate under the provisions of paragraph thirteenth of decedent's will.

The court further finds that the beneficiaries to whom distribution is hereinafter ordered are German Nationals.

"(d) The cash bequest to the persons, other than Richard Schneider and Lischen Viereck, specified in paragraph Eleventh (A), 3, of said will shall be distributed to the persons and in the amounts specified therein."

As successor to the Alien Property Custodian, the Attorney General of the United States appeals from the provisions (c) and (d) of the order which awarded the $10,000 bequest of Lischen Viereck to her children Wilhelm Viereck and Louisa Heitman and the $3,000 legacy to Louisa and the bequests to the other legatees named in XI, (A), 3 of the will.

CAN ALIEN ENEMIES TAKE UNDER THE LAW?

All beneficiaries of the trust named in XI (A), 3, of the will are German nationals, residing in Germany. Because Richard Schneider, unrelated to the testatrix, predeceased her, his legacy lapsed and became a part of the residue. Lischen Viereck, sister of testatrix, also predeceased the latter, but she was survived by two children, Wilhelm Viereck and Louisa Heitman. Louisa seeks to have distributed to herself not only the $3,000 specifically designated as payable to her upon the termination of the trust, but also her half of the $10,000 marked for her mother. Wilhelm also prays payment to himself of the other half of his mother's inheritance. That they cannot prevail is clearly the meaning of the law as applied to the document under consideration.

When decedent executed her will in 1943, World War II cast a pall over the planet. It had already drawn the United States into the conflict with Germany, which rendered doubtful the likelihood that a German national for an indefinite period could inherit from his kinsman in America, despite the recently enacted statute (Prob. Code, §259) providing for reciprocal inheritance by citizens of the United States and those of a power at war with us. While Hitler was at the zenith of his fury, it did not appear probable that the condition of section 259 could be fulfilled, because it is usually a question of fact. *(Estate of Schluttig,* 36 Cal. 2d 416 [224 P. 2d 695].

A reference to section 259, Probate Code, discloses that its chief ingredient is that the "rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries."

Now, at the trial below, the court received uncontradicted evidence pertaining to the matter and made its finding that at the time of the death of decedent reciprocal rights with respect to inheritance existed between citizens of the United States of America and citizens of Germany within the purview of section 259 of the Probate Code of California. Such finding renders unnecessary a discussion of numerous points urged with respect to contingent future estates and the rights of the Alien Property Custodian concerning them. The finding establishes that prior to Mrs. Scheider's death, the time had already arrived, as the court found, when her relatives in the "Vaterland" were "legally entitled" to "*take and inherit* under my will and this trust." The italicized phrase presents no problem. [2] "Take" is used in section 259; "inherit" means to succeed to ownership of a decedent's property by virtue of statutory succession.

THE RIGHT OF BENEFICIARIES RESIDING IN GEGMANY TO TAKE, DIED A-BORNTN'

[1b] Respondents say that they "did not acquire any right until the restrictions of wartime confiscation had passed, that their interests originated when they were personally able to receive the benefit of their inheritance which was after the time that German property could be vested and confiscated." This brings us to the observation that must be shocking to respondents: The trust provided by division Eleventh of the will never came into existence. The condition prescribed for its termination was fulfilled prior to the

passing of testatrix. She emphatically chose to prefer her relatives in the homeland as against those who in comfort enjoyed the security and peaceful existence of America. It is patent, also, that she intended the former to possess the $26,000 as soon as they should be able to "take" it. Their counsel agreed at the trial that the trust never came into being.[3] The court acknowledged that fact by ordering distribution directly to the persons named in XI (A) 3, whereby it ignored the trust.

Immediately, upon the death of Mrs. Schneider all legacies bequeathed by her, including the beneficial interests in the trust which had failed, vested in the designated donees (Prob. Code, §§300, 28; *Estate of Laurence,* 84 Cal. App. 2d 500, 504 [191 P. 2d 109]; *Burns v. McGraw,* 75 Cal. App. 2d 481, 488 [171 P. 2d 148]), subject only to the possession of the executrix for the purpose of administration. (Prob. Code, §142; Civ. Code, §694.) However, their delayed possession did not affect the fact that each legatee and each beneficiary was at decedent's death, vested with right of ownership of his bequest or beneficial interest. Such vesting occurred in 1945 when the testatrix departed this life. Hence, at the time, in 1946, when the Alien Property Custodian made the vesting order vesting ownership thereof in himself these beneficial interests were then the properties of the several persons named in (A) 3 of Eleventh and the Custodian was authorized by the Trading with the Enemy Act to seize them.

[3]"THE COURT: If Mr. Gebhardt's position prevails it comes into existence and terminates.
"MR. GEBHARDT: And immediately terminates."

Respondents emphasize the Twelfth division of the will. It is true that, like any other spendthrift clause, it is proof that the testatrix intended that the principal and income should be payable only ino the hands of each beneficiary. But when the trust failed, the title to the principal sum vested in and was payable to each legatee and the spendthrift provisions did not become operative. [3] "It is everywhere agreed that after the beneficiary has actually received the trust property his creditors may reach it and he may dispose of it as he wishes." (*Kelly v. Kelly*, 11 Cal. 2d 356, 362 [79 P. 2d 1059, 119, A.L.R. 71].) [4] It is well settled, however, that a person cannot by his own act create a trust that will protect his property from the claims of his creditors. It is against public policy to allow a man thus to tie up his property. (*McColgan v. Walter Magee, Inc.*, 172 Cal. 182, 186 [155 P. 995, Ann. Cas. 1917D 1059]; *Nelson v. California Trust Co.*, 33 Cal. 2d 501 [202 P. 2d 1021].)

[5] That the corpus of a testamentary trust which is already distributable to the beneficiary is his property and is seizable by the Alien Property Custodian under the statute is declared in 93 Corpus Juris Secundum, section 26(4), page 74 as follows: "The property which is subject to seizure or restrictions as to transfer under the Trading with the Enemy Act includes every kind of property tangible or intangible, whether or not useful to war industries. Equitable as well as legal interests are included. Particular property or interests held to be within the statute include an interest in a

decedent's estate,[4] such as a vested legacy, a contingent or expectant estate in remainder, an award of compensation for death, an award under a workmen's compensation statute, or a fund held by an American national for the benefit of an alien enemy. Other property or interests within the statute include the interest of a beneficiary in a trust, an interest in commissions or in a judgment, a debt, past-due installments owing to a wife under a separate maintenance decree, bonds or debentures, or corporate stock."

[1c] Conceding that the interests thus created were contingent, they were nevertheless property interests capable of transfer or of inheritance. (Civ. Code, §§669, 688, 693, 699; *Sinclair v. Crabtree,* 211 Cal. 524, 528 [296 P. 79]. Since they were interests capable of transfer, they became property of the German beneficiaries promptly on the death of Mrs. Schneider in 1945.

The conclusion is, therefore, unavoidable that at the time of the vesting order, in 1946, the estate of each legatee and the beneficial interest of each beneficiary of the trust was subject to seizure under the Trading with the Enemy Act, as amended.

The foregoing discussion applies to all persons named in subparagraph 3 other than (1) Richard Schneider whose legacy lapsed and fell into the residue, and (2) testatrix' sister, Lischen Viereck, who pre-

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[4] *Application of Miller* (2 C.C.A.), 288 F. 760, 766; *In re Bendheim's Estate,* 124 Misc. 424 [209 N.Y.S. 141, 794]; *Central Hanover Bank & Trust Co. v. Markham,* 68 F. Supp. 829; *In re Carrington's Estate,* 195 Misc. 442 [90 N.Y.S. 2d 757, 758]; *In re Littman's Estate,* 176 Misc. 679 [28 N.Y.S. 2d 458, 459].

deceased her leaving two children, Wilhelm Viereck and Louisa Heitman. (Prob. Code, §92.) They became legatees by virtue of the statute and with the same effect as if they had been so named in the will. *(Estate of Esposito,* 57 Cal. App. 2d 859, 862 [135 P. 2d 167]; *Estate of Pierce,* 32 Cal. 2d 265, 270 [196 P. 2d 1].) [6] "Although a beneficiary takes directly under the will of the testator under such an anti-lapse statute, he does so because the statute substitutes him for the predeceased devisee or legatee. He takes, not by virtue of the expressed intentions of the testator, but solely by virtue of the statute." *(Estate of Pierce, supra,* 270.) The vesting order named Lischen Viereck and purported to seize all her right, title and interest in the Schneider estate; but of course she had none. That order also named Louisa Heitman who was given a legacy of $3,000 under subparagraph 3, an interest which was increased to $8,000 through her mother's death; but it did not name or purport to vest any interest of Wilhelm Viereck. An amendment to the vesting order was made on May 13, 1954, under which this interest was seized. Such amendment was after the presidential proclamation of October 24, 1951, declaring the state of war with Germany to have terminated on October 19, 1951. (50 U.S.C.A. App. p. XXI.)

By its terms, the statutory power of seizure was limited to a period "during the time of war or during any other period of national emergency declared by the President." (50 U.S.C.A. App. §5(b) (1).) The earlier decisions are to the effect that the power cannot be exercised after the officially declared termination of

hostilities. (*Miller v. Rouse* (D.C. N.Y.), 276 F. 715, 716-717; *Matheson v. Hicks* (D.C. N.Y.), 10 F. 2d 872, 873; *Sutherland v. Guaranty Trust Co.* (2d C.C.A.), 11 F. 2d 696, 698; *United States Trust Co. v. Hicks* (D.C. So.D. N.Y.), 16 F. 2d 286, 288; *In re Sutherland* (2d C.C.A.), 23 F. 2d 595, 599.) But the Congressional Resolution declaring the end of the war with Germany (50 U.S.C.A. App. p. XX) says: "Provided, however, That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, or which has heretofore been vested or seized under that Act, including accruals to or proceeds of any such property or interest, shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued." Referring to that resolution, it was held that a seizure made after the termination date is a valid exercise of the war power, and the Supreme Court denied certiorari. (*Ladue & Co. v. Brownell,* 220 F. 2d 468, 471; —— U.S. —— [—— S. Ct. ——, *100 L. ——].) It therefore must be concluded that Wilhelm Viereck's interest was lawfully seized and falls in the same category as those of all the beneficiaries other than Richard Schneider.[5]

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*L.Ed. Adv. Opn.: Page 53.

[5]General License No. 101, issued June 24, 1953, which unblocked frozen assets, specifically provides in section 511.101 (c): "Nothing in this section shall be deemed to apply (1) to any property or interest that has been vested, or as to which an outstanding supervisory order has been issued, by the Attorney General or the Alien Property Custodian or the Office of Alien Property Custodian." (18 Fed. Reg. 3687, 8 C.F.R., Section 511.101.)

We have derived the foregoing decision with fearful misgivings. Research has exposed a strange and regrettable anomaly in the foreign relations of our central government. For 35 years the United States has expended billions of dollars in attempting to recapture and retain the friendship and loyal adherence of our enemies opposed in two world wars. It has verily poured out its wealth to accomplish that purpose within the German Republic. Now, after more than 10 years since fighting ceased, and over four years since World War II was declared terminated (50 U.S.C.A. App. p. XX) that same government, actuated by generous impulses toward a fallen foe, in nurturing the German state and its subdued people, withholds from these individuals within Germany comparatively modest sums ranging from $1,000 to $8,000, aggregating $25,000. By confiscating such moneys, we forfeit more goodwill than might have been acquired by the payment of multiplied thousands to the Bonn Government whether applied directly or indirectly to that end.

That the government's insistence upon its share of Mrs. Schneider's estate is confiscation was conceded at the time of the oral argument. Also, it is apparent from a consideration of the "return" legislation which culminated in the enactment of section 39 of the act passed in 1946 (50 U.S.C.A. App. p. 225) wherein it was provided as follows: "No property or interests therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act [sec-

tions 1-6 and 7-39 of this Appendix], shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date . . ." (See discussion of this subject in *Guessefeldt v. McGrath*, 342 U.S. 308 [72 S. Ct. 338, 96 L.Ed. 342].) The remedy lies with the Congress.

[1d] The order is reversed as to paragraphs (c) and (d) thereof; the following conclusions, designated in the order as findings, are stricken: "that the Attorney General of the United States is not entitled to any part of the twenty-six thousand dollar fund set forth in paragraph Eleventh of decedent's will, except to the extent that said Attorney General participates in the bequest therein of $1,000.00 to Richard Schneider which has lapsed and falls into the residue of said estate" (page 33, lines 23-29 of clerk's transcript herein); "that said persons are entitled to receive, in equal shares, the bequest of $10,000 provided for Lischen Viereck in said paragraph" (page 34, lines 2 and 3 of clerk's transcript herein); and "and are entitled personally to receive the respective sums specified in said paragraph" (page 34, lines 6 to 8 of clerk's transcript herein).

Paragraphs (c) and (d) of the order are stricken and in lieu thereof the following is inserted: "(c) The

bequest of $10,000 to Lischen Viereck under paragraph Eleventh (A), 3, (a) of said Will shall be distributed to the Attorney General of the United States; (d) The cash legacies to the persons other than Richard Schneider and Lischen Viereck, specified in paragraph Eleventh (A), 3, of said Will shall be distributed to the Attorney General of the United States."

Fox, J., and Ashburn, J., concurred.

FILED

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 509

ANNA VALENTINE SEIBERT and Other German Beneficiaries, APPELLANTS

vs.

HERBERT BROWNELL, JR., Attorney General of the United States as Successor to the Alien Property Custodian, and ELISE KILIAN, Executor, APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

MOTION TO DISMISS

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellee Herbert Brownell, Jr., the Attorney General of the United States, respectfully moves that the appeal from the Judgment of the District Court of Appeal of the State of California be dismissed on the grounds that the judgment rests on an adequate non-federal basis and that the federal questions sought to be reviewed were not properly raised and preserved.

This is a direct appeal from the final judgment of the District Court of Appeal, Second Appellate District, Division Two), of the State of California, entered on April 12, 1956. This judgment became final on June 6, 1956, when the Supreme Court of California denied appellants' petition for hearing. A notice of appeal to this Court was filed on August 7, 1956. The jurisdictional statement was filed on October 15, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2).

STATEMENT

This is a will construction case which arose out of a petition filed by appellee Elise Kilian, as executrix of a decedent's estate, for instructions concerning distribution of the estate (C.T. 6-18).[1] The Attorney General of the United States appeared in these proceedings as a consequence of a vesting order issued under the authority of the Trading with the Enemy Act (40 Stat. 411, as amended, 50 U.S.C. App. §§ 1 et seq.),[2] by which he vested the interests of all German beneficiaries in the estate. Appellants are certain of the German beneficiaries whose interests were vested (R.T. 8-9).

The decedent, Louise Schneider, an American citizen and resident of California, died testate in 1945. Her last will, executed in 1943, disposed of her entire estate to her own relatives and to those of her predeceased husband (C.T. 36-47). Under the provisions

[1] "C.T." will refer to the Clerk's Transcript, "R.T." to the Reporter's Transcript, "App." to the Appendix of the Statement of Jurisdiction.

[2] The authority and functions of the Alien Property Custodian under the Trading with the Enemy Act were transferred to the Attorney General by Executive Order No. 9788, October 14, 1946, 11 Fed. Reg. 11981, 3 C.F.R. 1946 Supp. 169.

of the will, so far as here pertinent, she transferred $26,000 in trust, the income of which was payable to specified beneficiaries (Paragraph Eleventh (A) 1, C.T. 38), all residents of the United States. Upon the death of the last survivor of the income beneficiaries, the trust was to terminate and the corpus was to be paid to the two classes of beneficiaries named in Paragraph Eleventh (A) 2 (C.T. 38-39), a majority of whom were Germans residing in Germany (C.T. 14-15). The trust was to terminate earlier, however, and the corpus was to be paid to ten named beneficiaries, "anything to the contrary in Paragraph Eleventh of my will notwithstanding," upon the happening of the following event:

> If at anytime during the continuance of this trust alien residents of Germany shall become legally entitled under the laws of the United States and the State of California to take and inherit under my will and this trust . . . (Paragraph Eleventh (A) 3, C.T. 39).[3]

The appellants were among the ten named, and all ten were German aliens residing in Germany (C.T. 13, 34).

In 1946, the Alien Property Custodian vested the appellants' interest in this estate as well as that of the

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[3] Under Paragraph Twelfth, the decedent imposed spendthrift restraints on the interests in the trust and provided that the income and principal shall be "deliverable only to the beneficiaries designated hereunder at the times entitled to take the same under the terms of the trusts, and the personal receipt of said beneficiaries shall, at the option of the trustee, be conditions precedent to the payment or delivery of the same by the trustee to such beneficiaries." (C.T. 44)

other named German beneficiaries (C.T. 65-66, App. 23).[4]

In 1953, the executrix filed a Petition for Instructions Re Distribution (C.T. 6-18). At the hearing on the Petition, evidence was introduced to establish the existence of the reciprocity required by Section 259 of the California Probate Code, Cal. Stats. 1941, ch. 895, § 1 (R.T. 11-29).[5] The trial court found that such reciprocity existed (C.T. 32-33, App. 29). No issue has been raised as to that finding.

The trial court held that the decedent intended by the phrase, "alien residents of Germany shall become legally entitled . . . to take and inherit," to require as a condition of the gift of $26,000 made by Paragraph Eleventh (A) 3 that each German beneficiary named in that Paragraph be able personally to receive his specified share; that each such beneficiary was en-

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[4] Two of the ten named beneficiaries, Lischen Viereck and Richard Schneider, predeceased the decedent. Since Richard Schneider was not related to the decedent, his legacy lapsed and fell into the residue (C.T. 33, App. 29). Lischen Viereck, however, was decedent's sister. She left two children, Wilhelm Viereck and Louisa Heitman, both German aliens residing in Germany. Under the California anti-lapse statute (Probate Code, Sec. 92, Cal. Stats. 1931, ch. 281, p. 587), they succeeded to Lischen Viereck's interest (C.T. 33-34, App. 30).

The 1946 vesting order specifically covered the interest of Louisa Heitman, one of the two children of Lischen Viereck. Not specifically named in that order was Wilhelm Viereck, the other of Lischen's children. Accordingly, in 1954, the Attorney General, as successor to the Alien Property Custodian, amended the 1946 order to include the interest of Wilhelm Viereck (C.T. 67, App. 26). Wilhelm did not appear in this proceeding and is not one of appellants here (R.T. 8-9).

[5] That statute conditions the right of a non-resident alien to inherit in California upon the existence of a reciprocal right of an American citizen to inherit in the country of which the alien is a national. The statute is set forth at App. 2.

titled personally to receive his share of the $26,000; and that the Attorney General, as successor to the Alien Property Custodian, was not entitled to any part of the $26,000.[6] (C.T. 32-34, App. 28-32).

On appeal by the Attorney General, the District Court of Appeal reversed, holding (1) that at the time of the decedent's death in 1945 alien residents of Germany could take and inherit under the law and so the condition requiring that German aliens "shall become legally entitled . . . to take and inherit," was satisfied; hence, the trust terminated and the $26,000 became payable to the German beneficiaries at that time and passed to the Attorney General by virtue of the vesting order; and (2) that even if the interests created by Paragraph Eleventh (A) 3 were contingent and the contingency had not occurred at the time the Attorney General's order was issued, such interests were nevertheless property interests and were subject to the seizure authority conferred by the Trading with the Enemy Act (App. 33-49).

The District Court of Appeal denied appellants' petition for rehearing, and the Supreme Court of California denied their petition for a hearing in that court. This appeal followed.

ARGUMENT

Appellants set forth under "Questions Presented by Appeal" some thirteen separate so-called federal questions (Jurisdictional Statement, pp. 6-10), which, they "raised in the trial court, and again in the District Court of Appeal of the State of California * * * and again in the Supreme Court of the State of Califor-

[6] Except to the extent that the Attorney General participated in one share which lapsed and fell into the residue (C.T. 33).

nia." (*Id.*, p. 24.) Nowhere do they specify, as requir by Rule 15(d), how and when these federal questio were raised in the state courts. The fact is that th were not.

The only question raised by appellants in all Ca fornia courts was the non-federal one whether or n they had an interest in the estate at the time the A torney General issued his order (see, *e.g.*, Appellant Petition for Hearing in the Supreme Court of Ca fornia, which is included in the certified record on f with this Court). Their position was that the w gave them an interest subject to the condition that th could personally have and receive it. They contend that they had no property interest until that conditi was fulfilled, and that when the Attorney General issu his order, before the condition was fulfilled, they h nothing which could be seized. The District Court Appeal disagreed with their interpretation of the wi and held the nature of the condition to be such that was satisfied at the time of decedent's death and hen gave appellants a property interest at the time of t issuance of the vesting order. Thus, its decision to the only issue raised by appellants rested on adequate non-federal ground. Accordingly, this appe should be dismissed for want of jurisdiction.

To be sure, the District Court of Appeal *sua spon* upheld a 1954 amendment to the vesting order (Ap 26-27, 45-46), and to that extent dealt with a feder question. However, that federal question was not a serted either in the petition for rehearing in the D trict Court of Appeal or in the petition for hearing the Supreme Court of California. Moreover, appe lants have no standing to raise it because they are n

affected by the decision on that issue. The only German beneficiary affected is Wilhelm Viereck, and he has never appeared as a party (R.T. 8-9).

CONCLUSION

The motion to dismiss the appeal should be granted.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
DALLAS S. TOWNSEND,
Assistant Attorney General.
JAMES D. HILL,
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IRWIN A. SEIBEL,
Attorneys.

NOVEMBER 1956.

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Reported below: 200 F. 2d 319.

No. 509. SEIBERT ET AL. *v.* BROWNELL, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL. Appeal from the District Court of Appeal of California, Second Appellate District. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Morris Lavine* for appellants. *Solicitor General Rankin, Assistant Attorney General Townsend, James D. Hill, George B. Searls* and *Irwin A. Seibel* for the Attorney General, appellee. Reported below: 140 Cal. App. 2d 710, 296 P. 2d 45.